

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130501

Docket: A-310-12

Citation: 2013 FCA 120

**CORAM: PELLETIER J.A.
GAUTHIER J.A.
MAINVILLE J.A.**

BETWEEN:

PRESCIENT FOUNDATION

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Vancouver, British Columbia, on March 20, 2013.

Judgment delivered at Ottawa, Ontario, on May 1, 2013.

REASONS FOR JUDGMENT BY:

MAINVILLE J.A.

CONCURRED IN BY:

**PELLETIER J.A.
GAUTHIER J.A.**



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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal brought by Prescient Foundation (“Prescient” or the “appellant”) pursuant to paragraph 172(3) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) (“Act”) from the confirmation by the Minister of National Revenue (“Minister”) of a proposal under subsection 168(1) of the Act to revoke the registration of Prescient as a charity.

[2] The Minister relied on the following four independent grounds to sustain the revocation of Prescient’s registration: (a) it participated in a tax planning arrangement for the private benefit of others; (b) it transferred an amount of \$574,000 for a share purchase that was in fact a non-

charitable gift to a non-qualified donee arising from the tax planning arrangement; (c) it made a gift to a non-qualified donee in the form of a \$500,000 transfer to a non-profit organization in the United States; and (d) it failed to maintain adequate books and records.

[3] Prescient challenges all the grounds for revocation and seeks that its revocation be quashed. As an alternative remedy, it seeks a declaration that its revocation was not “for cause”.

BACKGROUND FACTS AND PROCEEDINGS

[4] Prescient was incorporated on March 18, 2004 as a corporation without share capital under Part II of the *Canada Corporations Act*, R.S.C. 1970, c. C-32. It thereafter applied for registration as a charity. On May 19, 2004 it was found to qualify as a registered charity under paragraph 149(1)(f) of the Act, and it was designated a charitable public foundation.

[5] In its first year of operations, it was principally involved in a series of transactions relating to the sale of a farm in British Columbia and which are further described below (the “Farm Sale Transactions”). These transactions involved other charities and third parties and took place in February and March of 2005. The Minister subsequently revoked Prescient’s registration on the ground that the Farm Sale Transactions were part of a tax planning arrangement for the private benefit of certain taxpayers. The Minister also took the view that, as part of these transactions, a purchase of shares by Prescient resulted in a \$574,000 non-charitable gift to a non-qualified donee.

[6] Moreover, on December 22, 2005 Prescient transferred \$500,000 as a donation to the DATA Foundation (“DATA”), a non-profit organization resident in the United States and recognized by the American authorities as exempt from taxation pursuant to section 501(c)(3) of the US *Internal Revenue Code*, U.S.C. 26. It is on that basis that the Minister revoked the appellant’s registration on the ground that it had made a gift to a non-qualified donee.

[7] Though Prescient carried out other activities, the Farm Sale Transactions and the donation to DATA were important transactions for it, representing a very large part of its activities for the relevant financial years.

[8] On April 25, 2008, Prescient was notified by the Canada Revenue Agency (“CRA”) that it had been selected for an audit. The auditor found what she deemed to be numerous areas of non-compliance. On January 21, 2009, she submitted a letter setting out the results of her audit and noted that, failing a response from Prescient, a notice of intention to revoke its registration could be issued pursuant to subsection 168(1) of the Act. Thereafter followed an exchange of correspondence between Prescient and the tax authorities.

[9] A notice of intention to revoke Prescient’s registration pursuant to subsection 168(1) of the Act was sent to it on December 23, 2010 by the Director General of the Charities Directorate of the CRA. This letter set out a detailed explanation of the grounds supporting the notice. Prescient objected pursuant to subsection 168(4) of the Act, and a decision on that objection was reached on

April 20, 2012, proposing to confirm the intention to revoke. The formal notice of confirmation of revocation was issued on June 4, 2012; hence, the present appeal.

ISSUES

[10] The issues identified by Prescient in its notice of appeal may be described as follows:

- i. The Minister erred in concluding that the \$500,000 gift to DATA was a gift to a non-qualified donee. Prescient first submits that, as an American non-profit organization recognized under section 501(c)(3) of the US *Internal Revenue Code*, DATA qualifies as a registered charity pursuant to Article XXI of the Convention between Canada and the United States of America with respect to taxes on income and on capital (“Canada-U.S. Tax Convention” or “Convention”). Prescient further submits, as an alternative argument, that even if its gift to DATA was not made to a “qualified donee” pursuant to the Convention, it was nevertheless a charitable gift which could not give rise to a revocation of its registration under the Act.
- ii. The Minister erred in concluding (i) that the consideration paid for its purchase of shares in the context of the Land Sale Transactions was a gift to a non-qualified donee, and (ii) in finding that its participation in these transactions was part of a tax planning arrangement for the private benefit of others. Prescient submits that the shares were purchased for valuable consideration, and that any planning steps it took with respect to the Land Sale Transactions were for the charitable purpose of increasing the funds available to it for disbursement to qualified donees.
- iii. Prescient’s books and records met the requirements of section 230 of the Act, and any deficiency was insufficient to warrant the revocation of its registration.
- iv. In any event, the Minister could not inform the public through the CRA’s web site that Prescient’s registration had been revoked “for cause”.

THE STANDARD OF REVIEW

[11] Counsel for the Minister submits that all issues in this appeal, including the Minister’s interpretation of the Act and of the Canada-U.S. Tax Convention, should be determined on a standard of reasonableness. I disagree.

[12] The applicable standard of review has been authoritatively determined by our Court in the following two cases: *Action by Christians for the Abolition of Torture v. Canada*, 2002 FCA 499, 302 N.R. 109, at paras. 23-24, and *The Sheldon Inwentash and Lynn Factor Charitable Foundation v. Her Majesty the Queen*, 2012 FCA 136, 2012 D.T.C. 5090 (“*Inwentash*”), at paras. 18 to 23. In an appeal from a decision of the Minister confirming a proposal to revoke a registration of a charity brought pursuant to paragraph 172(3) of the Act, extricable questions of law, including the interpretation of the Act, are to be determined on a standard of correctness. On the other hand, questions of fact or of mixed fact and law, including the exercise of the Minister’s discretion based on those facts and the law as correctly interpreted, are to be determined on a standard of reasonableness: *World Job and Food Bank Inc. v. Canada*, 2013 FCA 65, at para. 3, citing with approval *Hostelling International Canada – Ontario East Region v. Canada (National Revenue)*, 2008 FCA 396, [2009] 2 C.T.C. 89, at para. 7 and *House of Holy God v. Canada (Attorney General)*, 2009 FCA 148, 2009 D.T.C. 5097, at para. 4.

[13] Extricable questions of law are to be decided in this case on a standard of correctness since: (a) the reasonableness standard of review does not apply to the interpretation of a statute by a minister responsible for its implementation, unless Parliament has provided otherwise: *Canada (Fisheries and Oceans) v. David Suzuki Foundation et al.*, 2012 FCA 40, (*sub. nom. Georgia Strait Alliance et al. v. Canada (Minister of Fisheries and Oceans) et al.*, 427 N.R. 110), at paras. 6 and 65 to 100; *Takeda Canada Inc v. Canada*, 2013 FCA 13, 440 N.R. 346, at paras. 111 to 116; *Canada v. Celgene Inc.*, 2013 FCA 43, at paras. 34-35; and (b) Parliament has not provided for deference to

the Minister on questions of law in the context of an appeal under paragraph 172(3)(a.1) of the Act: see the standard of review discussion set out in *Inwentash*, at paras. 20 to 22, which I adopt without reservation. I add to this discussion that, in the normal course of litigation involving the Act, no deference is showed by the Tax Court of Canada, or this Court, to the CRA's or the Minister's interpretation of the Act, and I see no reason why this approach should be different when dealing with appeals under paragraph 172(3).

[14] There are extricable questions of law raised by the appellant in this case which must be reviewed on a standard of correctness, including, notably, whether a charitable gift to a non-qualified donee is a valid legal ground to revoke a registration.

THE LEGISLATIVE FRAMEWORK

[15] A "registered charity" is defined in subsection 248(1) of the Act as including a charitable organization, a private foundation, or a public foundation that is resident in Canada and was either created or established in Canada. As a general rule, charitable organizations engage in charitable activities, while charitable foundations raise money for charitable purposes.

[16] Under subsection 149.1(1) of the Act, a "public foundation" must be a "charitable foundation". A "charitable foundation" is defined under that same subsection as a corporation or trust that is constituted and operated exclusively for charitable purposes. That subsection also provides that "charitable purposes" "includes the disbursement of funds to a qualified donee...". A "qualified donee" is defined as including a "registered charity".

[17] A public foundation which is registered as a charity is entitled to many advantages under the Act. First, under paragraph 149(1)(f), it is exempt of tax under Part 1 of the Act. Most significantly, it may receive gifts and issue receipts for such gifts conferring certain taxation benefits to the individuals or corporations providing the gifts. Because of these significant advantages, public foundations must meet stringent criteria set out under the Act, failing which they may be subject to the penalties provided for in Part V of the Act, and their registration under the Act may be revoked.

[18] The grounds for revoking the registration of a public foundation are notably set out in subsections 149.1(3) and 168(1) of the Act. Although these provisions have slightly changed since the impugned transactions of Prescient leading to the revocation of its registration, none of these changes are material to this appeal. These provisions currently read, in part, as follows:

149.1(3) The Minister may, in the manner described in section 168, revoke the registration of a public foundation for any reason described in subsection 168(1) or where the foundation

(a) carries on a business that is not a related business of that charity;

(b) fails to expend in any taxation year, on charitable activities carried on by it and by way of gifts made by it to qualified donees, amounts the total of which is at least equal to the foundation's disbursement quota for that year;

149.1 (3) Le ministre peut, de la façon prévue à l'article 168, révoquer l'enregistrement d'une fondation publique pour l'un ou l'autre des motifs énumérés au paragraphe 168(1), ou encore si la fondation, selon le cas :

a) exerce une activité commerciale qui n'est pas une activité commerciale complémentaire de cet organisme de bienfaisance;

b) ne dépense pas au cours d'une année d'imposition, pour les activités de bienfaisance qu'elle mène elle-même ou par des dons à des donataires reconnus, des sommes dont le total est au moins égal à son contingent des versements pour cette année;

(c) since June 1, 1950, acquired control of any corporation;

(d) since June 1, 1950, incurred debts, other than debts for current operating expenses, debts incurred in connection with the purchase and sale of investments and debts incurred in the course of administering charitable activities;

...

168. (1) The Minister may, by registered mail, give notice to a person described in any of paragraphs (a) to (c) of the definition “qualified donee” in subsection 149.1(1) that the Minister proposes to revoke its registration if the person

(a) applies to the Minister in writing for revocation of its registration;

(b) ceases to comply with the requirements of this Act for its registration;

(c) in the case of a registered charity or registered Canadian amateur athletic association, fails to file an information return as and when required under this Act or a regulation;

(d) issues a receipt for a gift otherwise than in accordance with this Act and the regulations or that contains false information;

c) a, depuis le 1^{er} juin 1950, acquis le contrôle d’une société;

d) a, depuis le 1^{er} juin 1950, contracté des dettes autres que des dettes au titre des frais courants d’administration, des dettes afférentes à l’achat et à la vente de placements et des dettes contractées dans le cours de l’administration d’activités de bienfaisance;

[...]

168. (1) Le ministre peut, par lettre recommandée, aviser une personne visée à l’un des alinéas a) à c) de la définition de « donataire reconnu » au paragraphe 149.1(1) de son intention de révoquer l’enregistrement si la personne, selon le cas :

a) s’adresse par écrit au ministre, en vue de faire révoquer son enregistrement;

b) cesse de se conformer aux exigences de la présente loi relatives à son enregistrement;

c) dans le cas d’un organisme de bienfaisance enregistré ou d’une association canadienne enregistrée de sport amateur, omet de présenter une déclaration de renseignements, selon les modalités et dans les délais prévus par la présente loi ou par son règlement;

d) délivre un reçu pour un don sans respecter les dispositions de la présente loi et de son règlement ou contenant des renseignements faux;

(e) fails to comply with or
contravenes any of sections 230 to
231.5;

e) omet de se conformer à l'un des
articles 230 à 231.5 ou y contrevient;

[...]

...

DISCUSSION

[19] The Minister found four independent grounds for revoking the charitable status of the appellant, and the appellant challenges all four grounds. Each ground of revocation will be addressed in relation to the following three underlying events which gave rise to the revocation (a) the contribution to DATA, (b) the Farm Sale Transactions (for which two grounds of revocation were raised by the Minister) and (c) inadequate books and records. The appellant also challenges the Minister's decision to publicize the revocation "for cause", and this issue will be addressed at the end.

Contribution to Data

[20] There is no dispute as to the facts. Prescient made a gift of \$500,000 to DATA on, or about, December 22, 2005. The Minister acknowledged in the notice of confirmation of revocation that DATA is a non-profit organization contemplated by section 501(c)(3) of the U.S. *Internal Revenue Code*; this is also acknowledged in the Minister's memorandum of fact and law (at para. 37). The record before us also shows that DATA is a charity whose principal mission is to alleviate poverty and illness in Africa.

[21] The only question concerning Prescient's financial contribution to DATA is, therefore, whether the Minister could revoke its registration for having made a contribution to that foreign charity.

[22] Prescient submits that the Minister erred in law by revoking its registration on the ground that its \$500,000 transfer to DATA was not a gift to a "qualified donee". Prescient first notes that a registered charity qualifies as a "qualified donee" under paragraph (b) of the definition of that term set out in paragraph 149.1(1) of the Act. Prescient further submits that, by operation of paragraph 7 of Article XXI of the Canada-U.S. Tax Convention and of subsections 3(1) and (2) of the *Canada-United States Tax Convention Act, 1984*, S.C. 1984, c. 20, a gift by a resident of Canada, such as Prescient, to a U.S. charitable organization, such as DATA, is to be treated, for the purposes of Canadian taxation, as a gift to a registered charity under the meaning of the Act. Since a registered charity is a "qualified donee" under the Act, Prescient concludes that the Minister was thus bound to treat its gift to DATA as one made to a "qualified donee".

[23] As an alternative argument, Prescient submits that even if its contribution or gift to DATA was not made to a "qualified donee", it was nevertheless a charitable gift which could not give rise to the revocation of its registration under the Act.

[24] I will first address Prescient's alternative argument.

[25] Subsection 149.1(1) of the Act provides that “charitable purposes” “includes the disbursement of funds to a qualified donee” (emphasis added). The use of the word “includes” clearly indicates that charitable purposes recognized under the Act extend beyond disbursements to qualified donees. The Act does not define the concepts of charitable purpose or activity; hence, the common law treatment of those concepts must be resorted to: *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10, at para. 143.

[26] *Levy Estate (Re)* (1989), 68 O.R. (2d) 385 (Ont. C.A.), at p. 393, holds that a gift to a foreign charity is a charitable purpose under the common law. In this appeal, the Minister does not challenge that doctrine.

[27] The CRA itself has recognized that a gift to a foreign charity has a charitable purpose in the context of the settlement proceedings involving the *Wolfe and Millie Goodman Foundation* in Ontario Superior Court of Justice file 08-06199 (“*Wolfe Settlement*”) which the parties reproduced in their Joint Book of Authorities: see the comments of D. M. Sherman, *Practitioner’s Income Tax Act*, (2013) 43rd edition, Carswell, Toronto at p. 1260 notes on proposed 149.1(2)(c); R.B. Hayhoe, “A Critical Description of the Canadian Tax Treatment of Cross-Border Charitable Giving and Activities”, (2001) 49 Canadian Tax Journal, 320 at 331-332; Drache, Hayhoe and Stevens, *Charities Taxation, Policy and Practice*, (2007) Carswell, Toronto, at section 12.2.2.

[28] In that case, the concerned private foundation had submitted an application before the Ontario Superior Court seeking a confirmation that a grant to a foreign charity met the foundation’s

charitable purposes. The application was resolved in the *Wolfe Settlement* by the CRA confirming that, insofar as its “disbursement quota” was met, the concerned private foundation could make disbursements to non-qualified donees which meet the definition of “charitable” at common law until such time as contemplated legislative amendments were adopted prohibiting such disbursements.

[29] There have been amendments adopted to add proposed paragraphs 149.1(2)(c), 149.1(3)(b.1) and 149.1(4)(b.1) to the Act. These paragraphs would allow the Minister to revoke the registration of a charitable organization, a public foundation or a private foundation which, after December 20, 2002, has made a gift to a foreign non-qualified donee. However, these legislative amendments were not in force when Prescient made its gift to DATA, and are still not in force.

[30] Though the CRA holds that registered charities cannot make gifts to foreign charities that are not qualified donees, that position is not grounded in an enforceable legislative enactment. The Minister reiterates, at para. 85 in his memorandum of fact and law, his position that, to qualify as charitable, a charitable public foundation must not only operate exclusively for charitable purposes, but must also only disburse funds to a qualified donee. However, the Minister offers no authority for that proposition, nor does he refer to any enforceable statutory requirement providing for such a restriction.

[31] In this case, the Minister has revoked the registration of Prescient invoking a ground that is not reflected in enforceable legislation. In effect, the Minister applied to Prescient the ground of

revocation provided for in paragraph 149.1(3)(b.1) of the Act, a provision which was not in force at the time the decision to revoke was made, and which, I repeat, is still not in force. As noted recently by our Court in *Edwards v. The Queen*, 2012 FCA 330, 2013 DTC 5028, at para. 14, “there seems something fundamentally unfair in the CRA’s administration of proposed amendments to the *Income Tax Act* for the past ten years as if they were already law.” In these circumstances, I can only conclude that this ground for revocation was unfounded.

[32] In the light of this conclusion, I need not address the issue of whether Prescient’s gift to DATA should be treated as a gift to a “qualified donee” as a result of the U.S.-Canada Tax Convention.

Farm Sale Transactions

[33] The Minister also revoked the charitable status of Prescient on two independent grounds related to the Farm Sale Transactions: (1) participating in a tax planning arrangement unrelated to its charitable purpose, and (2) in the course of said tax planning arrangement, making a share purchase (for \$574,000) which amounted to a gift to a non-qualified donee.

[34] The farming assets which were the object of the Farm Sale Transactions were beneficially owned by Herman Dekker and his spouse Maria Vogel-Dekker (the “Dekkers”) through 570129 BC Ltd. (“Vision Poultry”). These farm assets were eventually sold in 2005 to Steven Brandsma and Krista Brandsma (the “Brandsmas”) as a result of a predetermined series of related and complex transactions involving Theanon Charitable Foundation (“Theanon”), Essential Grace Foundation

(“Essential”), Gateway Benevolent Society (“Gateway”), Philanthropy Without Frontiers (“Frontiers”), and Prescient. These organizations were all charities in which the same Vancouver lawyer was involved as either director or legal counsel, and who acted as their driving force.

[35] The transactions may be summarily described as follows:

- i. in early 2005, Theanon made transfers in the form of gifts to Frontiers (\$1,190,000), Gateway (\$665,000), Essential (\$665,000) and Prescient (\$570,000);
- ii. on February 25, 2005, Frontiers provided a loan to Vision Poultry in the amount of \$1,440,000 for the purpose of paying off the amounts owing on its farm assets to the Bank of Montreal;
- iii. simultaneously, Gateway, Essential and Prescient entered into an agreement with the Dekkers to buy all the outstanding shares of Vision Poultry for a purchase price of \$3,370,000, which was to be paid by assuming the loan of \$1,440,000 from Frontiers and by providing the remainder (approximately \$1,930,000) in cash;
- iv. through this share sale transaction, 35% of the shares of Vision Poultry were acquired by Gateway, 35% of the shares were acquired by Essential and 30% of the shares were acquired by Prescient;
- v. on March 1, 2005, Gateway, Essential and Prescient took measures to ensure that Vision Poultry (which they now controlled) gifted all its farm related assets to Theanon;
- vi. this gift had the result of rendering worthless the shares in Vision Poultry which had been acquired by Gateway, Essential and Prescient; in fact Prescient wrote down to zero the value of these shares in its own financial statements;
- vii. also as a result of this gift, Theanon appears to have assumed the loan made to Vision Poultry by Frontiers in the amount of \$1,440,000;
- viii. as a further result of the gift of the farm assets, Theanon issued a charitable donation receipt for \$2,020,000 to Vision Poultry, which was used to offset any tax on capital gains realized by Vision Poultry;

- ix. the same day it received the farm assets as a donation (March 1, 2005), Theanon sold them to the Brandsmas for \$3,460,000, to be paid in cash and through a second mortgage of \$350,000 granted by Theanon;
- x. on March 2, 2005, the proceeds from the sale to the Brandsmas (deduction made of the transaction fees) in the amount of \$3,002,852.98 were deposited in a trust account, and an amount of \$1,563,917.89 was then paid to the Dekkers from that account;
- xi. on March 2, 2005, Theanon assigned its second mortgage with the Brandsmas to the Dekkers for \$350,000;
- xii. a few days prior to this mortgage assignment (on February 28, 2005) Herman Dekker had transferred \$350,000 to Theanon in the form of a charitable donation for which Theanon issued to him a tax receipt;
- xiii. on March 30, 2005, Theanon paid Frontiers \$1,010,000 in partial reimbursement of Frontiers' \$1,440,000 loan; Theanon subsequently reimbursed Frontiers the remaining outstanding amounts on the loan;
- xiv. one year later, on April 30, 2006, Theanon recorded specific gifts to Gateway (\$139,000), Essential (\$54,000), and Prescient (\$84,000).

[36] The Minister concluded that these transactions amounted to participating in a tax planning arrangement for the private benefit of others and, as such, were not entered into for charitable purposes. Consequently, the Minister concluded that he should revoke Prescient's registration as a result of its participation in the Farm Sale Transactions. After carefully reviewing the concerned transactions and Prescient's submissions in this appeal, I find that the Minister's conclusion was reasonable in the circumstances.

[37] The overall purpose of the Farm Sale Transactions was to facilitate the sale of the farm assets to the Brandsmas while avoiding taxes otherwise payable by Vision Poultry and the Dekkers through a tax planning scheme seeking to use the special tax privileges of registered charities to the

private benefit of specific individuals and corporations. In effect, Prescient's purchase of the shares of Vision was part of a scheme to route to the Dekkers, on a tax-free basis, the proceeds received from the Brandsmas for the sale of the farm assets.

[38] The special advantages extended to charities under the Act are meant to assist them in pursuing their charitable purposes. Under subsection 149.1(1) of the Act, charitable foundations must thus be operated exclusively for charitable purposes. Prescient broke that important rule through its participation in the Farm Sale Transactions. By so doing, it ignored the fundamental purpose of the special advantages provided to charities under the Act. In the light of the egregious nature of the Farm Sale Transactions and of Prescient's participation therein, it was reasonable for the Minister to revoke Prescient's registration under the Act.

[39] I do not accept Prescient's submission that its intention in participating in the Farm Sale Transactions was to increase the amounts made available to it and to other registered charities for charitable purposes. I accept that these transactions resulted in payments in the nature of commissions being provided to the involved charitable organizations, notably an amount of \$84,000 for Prescient, and that these amounts may have increased the overall funds available to these organizations. Though these commissions were treated as "gifts" by the participants, it does remain that the primary purpose of the Farm Sale Transactions was not to benefit the concerned charities, but, rather, to use the tax privileges of the concerned charities in order to confer unwarranted tax benefits on the private individuals and corporation involved.

[40] Nor do I accept that the Farm Sale Transactions were some form of “related business” activity carried out by Prescient. The net result of Prescient’s purchase of 30% of the shares of Vision Poultry and of the subsequent “gifting” of Vision Poultry’s assets to Theanon was to strip the shares of all value. This was a predetermined outcome known to Prescient at the time it purchased the shares. There could be no “related business” activity when it was known, at the outset of the activity, that its outcome would be a major loss for Prescient.

[41] Prescient also submits, citing *R. v. E Littler Sr* (FCA), [1978] C.T.C. 235, 78 D.T.C. 6178 (“*Littler*”), that the Minister erred in concluding that the amount it paid to the Dekkers to acquire Vision Poultry’s shares was a gift rather than a consideration for the sale of the shares. I acknowledge that this Court has stated in *Littler*, at p. 239 (*per* Jockett C.J.), that a “contract of sale, which is, by definition, a transfer of property for a consideration, cannot be a gift”. However, that statement was made in the context where “no question having been raised as to the *bona fides* of the contracts of sale” (*ibid.*). In contradistinction thereto, in the instant case, the Minister is, indeed, raising the *bona fides* of the transaction by which Prescient acquired Vision Poultry’s shares.

[42] Nevertheless, though the purchase of the shares was clearly part of a series of questionable transactions, I cannot conclude that the amount paid by Prescient for the shares was a gift. The share transaction transferred the beneficial ownership of the farm assets held by Vision Poultry to Prescient and the other charities involved in the purchase. There was, therefore, a consideration given by the Dekkers in exchange for the purchase. This may have been part of a series of transactions designed to avoid taxes, nevertheless the end result was that the Dekkers sold their

interest in the farm assets. However, this finding does not affect my prior conclusion that the Minister acted reasonably in revoking Prescient's registration for its participation in the Farm Sale Transactions.

Inadequate Books and Records

[43] The notice of confirmation of revocation dated June 4, 2012 states that Prescient "failed to maintain adequate books and records". The Minister submits that, in itself, this was a sufficient ground to revoke its registration.

[44] The notice of intention to revoke dated December 23, 2010 indicated that the principal concern was that many relevant documents were provided to the CRA well after the date on which the auditor carried out her on-site audit review of Prescient, and after the results of the audit had been disclosed to Prescient. The CRA expressed the view that providing documents after the audit and with one's representations was not sufficient to meet the requirements of section 230 of the Act. The CRA therefore took the position that Prescient had contravened section 230 of the Act by failing to maintain complete and sufficient records allowing the CRA to verify the information contained within its registered charity information returns and financial statements.

[45] Registered charities have significant advantages available to them under the Act, and as a result, they must maintain records containing information which allows the Minister to verify their compliance with the Act. That obligation is set out in subsection 230(2) of the Act, which read as follows at the pertinent time periods at issue in this appeal:

230. (2) Every registered charity and registered Canadian amateur athletic association shall keep records and books of account at an address in Canada recorded with the Minister or designated by the Minister containing

(a) information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration under this Act;

(b) a duplicate of each receipt containing prescribed information for a donation received by it; and

(c) other information in such form as will enable the Minister to verify the donations to it for which a deduction or tax credit is available under this Act.

230. (2) Chaque organisme de bienfaisance enregistré et chaque association canadienne enregistrée de sport amateur doit tenir des registres et des livres de comptes à une adresse au Canada, enregistrée auprès du ministre ou désignée par lui, qui contiennent ce qui suit :

a) des renseignements sous une forme qui permet au ministre de déterminer s'il existe des motifs d'annulation de l'enregistrement de l'organisme ou de l'association en vertu de la présente loi;

b) un double de chaque reçu, renfermant les renseignements prescrits, visant les dons reçus par l'organisme ou l'association;

c) d'autres renseignements sous une forme qui permet au ministre de vérifier les dons faits à l'organisme ou à l'association et qui donnent droit à une déduction ou à un crédit d'impôt aux termes de la présente loi.

[46] Paragraph 230(2)(a), on which the Minister principally relies to justify the revocation of Prescient's registration, is vague. This has important consequences for the purpose of determining the reasonableness of the Minister's decision to revoke Prescient's registration on the ground that it has not complied with that paragraph, as the Minister is allowed to do under paragraph 168(1)(e) of the Act.

[47] For the revocation of a registration to be reasonable under this ground, the Minister must (a) clearly identify the information which the registered charity has failed to keep, and (b) explain why

this breach justifies the revocation of the charity's registration. It is not sufficient to simply state that the charity has failed to keep proper records. Rather, the Minister must clearly set out the particulars of the alleged breach.

[48] This is so for two principal reasons: (a) natural justice requires that the registered charity be properly and adequately informed of the particulars of the allegations so as to allow it to respond in a meaningful way to those allegations; and (b) this Court must be in a position to clearly understand why the Minister is revoking the registration on this basis so as to allow it to determine whether that sanction was reasonable in the circumstances.

[49] As stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process." In the context of the revocation of the registration of a charity on the basis of paragraphs 230(2)(a) and 168(1)(e) of the Act, this usually requires the Minister's representative to transparently and intelligibly explain in the notice of intention to revoke which records and information the charity failed to keep and to make available, and why this failure should result in the revocation of its registration. This does not, however, preclude the Minister from later referring in this Court to prior correspondence in which the issue of inadequate records was raised with the concerned registered charity, insofar as such prior correspondence is relevant to the particulars of the alleged breach as set out in the notice of intention to revoke.

[50] Regardless of who bears the initial burden of proof, as part of the reasonableness inquiry, the Court must be satisfied that it was reasonable, in the circumstances, for the Minister to require the records or information at issue, and that the revocation of the charity's registration was a reasonable response to a failure to maintain or provide them.

[51] Indeed, the Minister has less drastic administrative corrective measures or intermediate sanctions available to him, such as formal notices, compliance agreements, or the suspension of a charity's tax receiving privileges for one year under paragraph 188.2(2)(a) of the Act. The registration of a charity that fails to maintain proper records should, therefore, only be revoked on this ground in case of material or repeated non-compliance. The CRA itself takes this approach in its "Guidelines for applying the new sanctions", available on its web site.

[52] Applying these principles to this case, I must first determine whether the Minister reasonably found that Prescient had failed to maintain proper records.

[53] I first note that Prescient maintained no records of its Board of Directors meetings relating to its involvement in the Farm Sale Transactions, most notably concerning its acquisition of 30% of the shares of Vision Poultry. Articles 14.7 and 14.8 of Prescient's own by-laws (Appeal Book ("AB") at p. 23) required its board of directors to approve that acquisition in order to determine both whether it was a prudent investment and whether Prescient should invest in this type of shares. Yet no record of such a meeting was maintained.

[54] Moreover, Prescient did not maintain documentation clearly showing that its gift to DATA had been made to an American charity, nor did it disclose this important fact to the CRA auditor in a timely fashion. As the record shows, the auditor raised the issue of the contribution to DATA in a query to Prescient dated July 8, 2008 (AB p. 250) and in a letter to Prescient dated January 21, 2009 (AB p. 520). The lack of proper documentation relating to this transaction, coupled with the failure of Prescient to voluntarily disclose the relevant information in a timely fashion, resulted in the auditor erroneously assuming that the contribution had been made to a Canadian charity bearing a similar name to that of DATA. It was only in May of 2009 that the auditor was made aware that the contribution had been made to an American charity.

[55] In light of this, it was reasonable for the Minister to conclude that Prescient did not maintain adequate records. That being said, was it also reasonable for the Minister to conclude that Prescient's registration should be revoked for that reason alone?

[56] Though Prescient was remiss in maintaining proper records of the Farm Sale Transactions, the CRA auditor was nevertheless supplied with a considerable amount of information concerning these transactions which allowed her to understand both their scope and their nature. In my view, it would not have been reasonable for the Minister to revoke Prescient's registration on that basis alone. On the other hand, Prescient's failure to maintain adequate records and books of account showing that its contribution to DATA was made to an American charity, coupled with its failure to voluntarily and promptly disclose this fact to the auditor, constitutes a very serious matter. Thus, both failures, taken together, are sufficient, in the circumstances of this case, to conclude that the

Minister acted reasonably in revoking Prescient's registration on the ground that it had failed to maintain adequate books and records.

Revocation "For Cause"

[57] Finally, Prescient asks this Court to declare that the revocation of its registration was not "for cause" on the ground that the Minister has no legal authority (a) to characterize a decision to revoke a charity's registration as having been made for cause, and (b) to inform the public of such through the CRA's website.

[58] It should be noted that the registration of a charitable public foundation, such as Prescient, may be revoked under the Act both upon the application of the foundation (paragraph 168(1)(a)) or for one or more of the enumerated grounds set out in subsection 149.1(3) or paragraphs 168(1)(b) to (e) of the Act. Moreover, if a charity's registration has been revoked, paragraph 241(3.2)(e) of the Act allows the CRA to provide to any person a copy of the entirety, or any part, of any letter sent by or on behalf of the Minister to the charity and relating to the grounds for the revocation.

[59] In light of these provisions of the Act, Prescient's submissions are without merit.

Consequently, I need not decide here whether this Court would have had the jurisdiction to issue the declaration sought by Prescient within the framework of an appeal under paragraph 172(3)(a.1) of the Act.

CONCLUSION

[60] For the reasons set out above, I would dismiss this appeal with costs.

"Robert M. Mainville"

J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-310.12

APPEAL PURSUANT TO PARAGRAPH 172(3) OF THE *INCOME TAX ACT*

STYLE OF CAUSE: Prescient Foundation v.
Minister of National Revenue

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: March 20, 2013

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: PELLETIER J.A.
GAUTHIER J.A.

DATED: May 1, 2013

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